IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.428 OF 1999

Filip Bavatis Waz ..Appellant

Versus

The State of Maharashtra ..Respondent

Mr.D.N.Nalawade for the appellant

Mrs.A.S.Pai for the respondents

CORAM: S.B.MHASE &
S.R.SATHE, JJ.

DATE : 13th Sept, 2005

JUDGMENT (PER S.R.SATHE, J.)

1. Appellant, the Original Accused in Sessions Case No.11 of 1998 has preferred this appeal against the judgment and order passed by the Court of Additional Sessions Judge, Gadhinglaj, whereby the accused was convicted for the offence punishable under Section 302 of I.P.C. and was sentenced to suffer imprisonment for life and to pay fine Rs.1000/- i.d. to suffer S.I. for six months.

2. The brief facts giving rise to this appeal are as under:

. The marriage of accused and deceased Shobin had taken place about 20 to 22 years back from the date of incident which is dated 26th February, 1998. Out of the said wedlock they had three daughters and one son. For the initial period of few years the relation between the accused and the deceased Shobin were cordial. However, subsequently the accused started doubting the fidelity of Shobin and on that count he used to quarrel with her and harass her.

3. On 25th February, 1998 at about 9.30 p.m.the daughter of the accused namely Malina and her other sisters had gone to bed. At that time the accused was working in the hotel which was being run by him in front portiob of his house at village Naganwadi, Taluka Chandgad. After some time the accused awoke his daughter Malina and told her that her mother fell in kitchen due to giddiness and died. She therefore went to kitchen and she found her mother lying there. Accused asked Malina to call one Misal who was residing at some distance from the house of the accused. Malina therefore went to said Misal and called him. She also called her grandfather who was also residing at some distance. He, in turn called doctor who on his arrival declared Shobin to be dead. By that time the Police

Patil of the village, namely Bhikaji Patil had also come to know from one Suresh Vithoba Gawade that the wife of accused has expired. The Police Patil in turn gave this information to Chandgad Police Station and the police head constable Yellappa Desai went to the house of the accused. At that time he found that the dead body of the wife of the accused, was lying in the house. He, therefore, drew inquest panchanama exhibit 21 and sent the dead body for post mortem. The doctor opined that the death was due to Asphyxia due to strangulation. On the information received, the police head constable filed complaint exhibit 17 which was registered for the offence punishable under section 302 of I.P.C. Police then arrested the accused and recorded the statement of various witnesses. After completion of investigation the police submitted chargesheet against the accused in the Court of JMFC Chandgad.

4. Finding that the accused is chargesheeted for the offence punishable under Section 302 of I.P.C. which is exclusively triable by the Court of Sessions, the learned JMFC committed the case to the Court of Sessions. The learned Additional Sessions Judge, Gadhinglaj framed charge exhbit 3 against the accused. The charge was read over and explained to the accused.

The accused pleaded not guilty and claimed to be tried. From the suggestions put to the P.Ws and from the statement of the accused recorded under section 313 of Cr.P.C. it appears that the defence of the accused is of total denial. In order to bring home the guilt of the accused, the prosecution examined as many as nine witnesses, consisting of P.W.1. Yellappa Desai, police head constable who visited the house of the accused and filed complaint, exhibit 16, P.W.2. Mina Irish Waz, sister-in-law of the accused who acted as panch for inquest exhibit 20, P.W.3 Zeron Fernandes, the relative of the accused, through whose intervention the marriage was settled, exhibit 22, P.W.4 Dr.Shivaji Lakhu Patil, Civil Surgeon from Kolhapur hospital, under whose observation the accused was for few days, exhibit 25, P.W.5. Iris Waz, brother of the accused exhibit.34, P.W.6.Rozai Kutino, sister of the deceased exhibit 35, P.W.7 Miss Malina Filip Waz daughter of the accused exhibit 36, P.W.8 Dr.Ramesh Khot, who did post mortem exhibit 38 and P.W.9. the Investigating Officer P.I. Chandrakant Ombase, exhibit 44. The prosecution also produced the inquest panchanama at exhibit 21, post mortem report exhibit 39 and certain other documents. The defence did not adduce any evidence. After considering the evidence on record, the learned Trial Judge came to the conclusion that the prosecution has

proved beyond reasonable doubt that the accused has committed murder of his wife Shobin. He therefore passed the above order.

5. Being aggrieved by the said order, the accused has filed the present appeal. In this appeal before us Shri Nalawade, learned Advocate for the accused has urged only two points. Firstly, he submitted that the learned trial judge has not properly appreciated the evidence and has wrongly held that the circumstantial evidence on record is sufficient to prove beyond reasonable doubt the guilt of the accused. Secondly, he argued before us that the accused was in fact insane and as per Section 84 of the I.P.C. the accused shall have to be acquitted as at the relevant time he was not aware as to what he was doing. As against this, Mrs.Pai, learned APP supported the judgment and order passed by the trial Judge.

6. It is not in dispute that the marriage of the deceased and accused had taken place about 20 to 22 years back and out of the said wedlock they had four children. Admittedly, at the relevant time the accused, his wife Shobin and other family members were residing at their house at Naganwadi. The house was consisting of two portions. The front portion was

being used as hotel where the accused was conducting his business and the back portion of the said premises was being used as residential premises. It is an admitted fact that on 25th February 1998 at about 9.30p.m. when the Police Patil visited the house of the accused his wife Shobin was lying on the ground in kitchen. It is also admitted that at the relevant time one Dr.Patil was called and after examining Shobin she was declared to be dead.

7. The question is whether the death of Shobin is accidental, homicidal or suicidal. At the outset it must be mentioned that it is nobody's case that the death of Shobin is suicidal. However, an attempt is made on behalf of the defence to show that it was accidental death. So we have to scan the evidence on record and find whether the prosecution has proved beyond reasonable doubt that the death of Shobin is homicidal. For this purpose we can firstly place reliance on the inquest panchanama exhibit 21 and the deposition of P.W.2 Mina Irish Vaz Exhibit 20 who acted as panch for the said inquest. She has categorically stated that at the time of said panchanama one mark was found below the right ear of the body. If we see the inquest panchanama, Exhibit 21, it is clearly mentioned that a ligature mark over the neck of about four inch

in length was noticed. Similarly there are other witnesses who have also categorically stated that when they saw the dead body of Shobin they noticed some injury mark on the neck. P.W.1 Yellappa Mahadeo Desai, exhibit 16, P.W.3 Zeron Juvan Fernandes, who is relative of the accused, exhibit 22, P.W.5 Iris Waz, brother of accused Exhibit 34 and P.W.7 Malina Filip Waz exhibit 35 have specifically stated that when they saw the dead body of Shobin they noticed abrasion mark below the ear and on the neck. What is important to be noted is that if we see the post mortem report exhibit 39/C and in particular column No.17 of the same, we find that therein the doctor has mentioned the external injuries found on the dead body. They are as follows :

1. Ligature mark over neck at the level of thyrid cartilage, Horizontal placed. Ligature mark from widline of neck anteriorly-Encireling the Rt. Side of neck completely upto hepe of neck on Lt. side. Ligature mark length 17 cms, breadth 2 cms irregularly. Breadth is variable. It is 2 cms over Rt. side of interior lateraloftart of neck. breadth is variable on poft Lt.side of neck. Dry, black coloured ligature mark.

2. Abrasion ovr Rt. Fort on lateral and interior aspect.

3. Abrasion over left side forehead.

4. Abrasion over Lt. lateral aspect of eyebrow.

The Doctor who did the post-mortem, namely Dr.R.K.Khot exhibit 38 has also specifically stated that the

injuries which were found on the neck of the deceased were ligature marks. From the same he has opined that the death was due to Asphyxia due to strangulation. So, having regard to all this evidence one can safely conclude that the prosecution has proved beyond reasonable doubt that the death of deceased was homicidal.

8. Next question that falls for consideration is whether there is sufficient evidence to show that the said death is caused at the hands of the accused. It must be noted that there is no eye witness to the incident and the case rests solely on the circumstantial evidence. The law regarding circumstantial evidence is well settled. Circumstantial evidence can be sole basis for conviction provided the conditions laid down in various authoritative pronouncements are satisfied. For this purpose useful reference can be made to a case **Bodhraj vs. State of Jammu & Kashmir AIR 2002 SC 3164** wherein their Lordships have have held that circumstantial evidence can be sole basis for conviction. Their Lordship have observed :

> "15. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touch stone of law relating to circumstantial evidence laid down

by this Court as far as back in 1952.

16. In Hanumant Govind Nargundkar and another v. State of Madhya Pradesh (AIR 1952 SC 343), wherein it was observed thus :

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instant be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the acused and must be such as to show that within all human probability the act must have been done by the accused.

9. Bearing in mind the above observations of the Apex Court we have to scan the circumstance on record and find out whether the same are unerringly pointing out the guilt of the accused. The first circumstance on which the prosecution has relied is that the relations between the accused and deceased Shobin were strained and he was having doubt about the fidelity of the deceased. Not only that but there is evidence on record to show that previously the accused had even assaulted Shobin. It has been so stated by the prosecution witness No.3 Zeron Fernandes with whose intervention the marriage of accused and deceased was settled. He has clearly stated that Shobin had made a

complaint to him about the ill-treatment meted to her by the accused and at that time he and some other persons had tried to convince and give understanding to the accused, but even at that time the accused assaulted Shobin and as a result of the same Shobin had even filed a complaint against the accused. P.W.5 Iris Waz, the brother of accused has also stated that accused was doubting character of his wife and their relations were strained. There was no reason for him to depose against him. P.W.6 Sister of deceased and P.W.7 daughter of accused have also stated about the strained relations between accused and deceased. The strained relations between the accused and Shobin are also indicative of the motive behind the crime.

10. The second and most important circumstance is that at the relevant time the accused and Shobin were present in the house while others had gone to bed. It is pertinent to note that P.W.7 Malina, Exhibit 36 the daughter of the accused has specifically stated that on that day after dinner she and her sister had gone to bed and at that time the accused was in the hotel and front and back door of the said hotel were closed. She has also stated that her mother i.e. deceased was also in the house. It is pertinent to note that this statement of Malina who is quite grown up girl,

studying in 10th standard at that time, has totally gone unchallanged. So, there is no reason to disbelieve the same. Thus, this is a case where we find that at the relevant time the other members of the family had gone to sleep and only the deceased and the accused were present in the house. Both of them were last seen together by the prosecution witness No.7.Malina, before she went to bed. At 9.30 p.m. or so she was awakened by her father i.e. the accused and he told her that her mother Shobin fell as a result of giddiness. It means that at the relevant time the accused was very much present there and besides him no one else was there. Naturally, it was in fact necessary for the accused to give satisfactory explanation regarding the fall or cause for the injury sustained by the deceased. It is pertinent to note that the prosecution has proved beyond reasonable doubt that at the relevant time ligature marks were noticed on the neck of deceased. So, this clearly indicates that the story given by the accused to Malina was false. It is pertinent to note that the said witness has also stated that at the relevant time when she started crying her father told her not to cry, otherwise the neighbours would gather there. This also indicates the guilty mind of the accused. It has come on record that the accused did not ask Malina to call

the adjacent neighbourers, but on the contrary asked her to call one Misal, who was in fact residing at some distance from the house of the accused. So, the evidence of last seen together is very important and clinching circumstance. The medical and other evidence negatives the story of the accused that Shobin sustained injury as a result of the fall due to giddiness. On the contrary the falsity of defence is also a circumstance which becomes important in the light of other evidence.

11. It was tried to be argued on behalf of the defence that as there was no door to the staircase leading from kitchen to the terrace and there wass possibility that someone else might have come and committed the offence in question. However, if we take into consideration all the facts and circumstances then this version does not even stand on the score of probabilities. There is nothing on record to show that any one else was having any grudge against Shobin. Nor there is evidence to show that any stranger had come to the house to commit robbery or to cause any sexual assault on Shobin. In the absence of any such material and having regard to the fact that at the relevant time the accused was very much present in the house, it is difficult to believe that there was any scope for a

stranger to enter the house and commit the offence without the same being noticed by accused particularly when the daughter has stated that when she had gone to sleep both accused and her mother were in the house Thus, if we take into consideration all the facts and above mentioned circumstances together then the same are certainly sufficient to lead to only irresistible conclusion that the accused was the person who caused death of Shobin by strangulation.

12. Shri Nalawade, learned Advocate for the accused tried to argue before us that the accused is insane and in view of the provisions of Section 84 of IPC he has to be released. While considering this aspect it must be noticed that there is presumption that the accused was not insane. However the said presumption is rebuttable. Naturally it is for the accused to discharge the burden and bring his case within the ambit of Section 84 of the Indian Penal Code. Ofcourse, it is well settled that this burden or onus on the accused is not as heavy as that of prosecution but equivalent to that which lies on a party in a civil proceeding. It has been so held in **AIR 1964 SC 1563.**

13. Taking into consideration these observations if we look to the facts and circumstances of the present

case we find that right from the time the accused was arrested till 25.9.1998, at no point of time the contention was taken on behalf of the accused that accused is a insane person. It is pertinent to note that even at the time when the charge was framed and the same was read over and explained to the accused, he did not make any submission with regard to the insanity. It was not even suggested at that time that previously at any point of time he had taken treatment for such illness. It is needless to say that the crucial point of time for ascertaining the state of mind of accused is the time when the offence is committed. In the instant case, admittedly there is absolutely no evidence to show that on the date of incident the accused was insane. It appears that for the first time on 25.8.1998 application was submitted on behalf of the defence and that too in view of the evidence of P.W.3 Zoren Fernandes because in his cross examination it transpired that previously i.e. about five years back the accused had taken some treatment from doctor at Belgaum. As a result of this, application exhibit 23 was submitted and the trial Court under the circumstances was pleased to send the accused to Civil Surgeon, Kolhapur for observation. Accordingly, the Civil Surgeon, Kolhapur, after observing the accused from the period 29.8.1998 to

21.9.1998 gave a certificate Exhibit 30 wherein it is mentioned that after the accused was observed by the psychiatrist in the hospital he was found to be suffering from "chronic schizophrenia". Naturally taking advantage of this certificate it was argued on behalf of the defence that the trial be stayed. From the perusal of the record it appears that both the parties advanced their arguments on this point and the trial Judge after considering their arguments and having regard to the evidence of Doctor Shivaji Patil exhibit 29 came to the conclusion that the doctor had not at all kept any proper record about the observations made during the period 29.8.1998 to 21.9.1998. He was not even in a position to say as to on what basis the conclusion was arrived that the accused was suffering from chronic schizophrenia. During the cross examination the doctor also admitted that there is no such specific type of chronic schizophrenia or residual schizophrenia. Not only that, but, ultimately he also admitted that the patient was found normal and within limits. Not only that but the Trial Court also observed that having regard to these facts and the conduct of the accused during trial which never showed any symptoms or signs that he was suffering from schizophrenia, it is difficult to accept and rely on the said certificate. He, therefore, held

that the accused was capable of knowing and understanding the trial against him. Naturally he proceeded with further trial of the case.

14. Shri Nalawade, learned Advocate for the accused strenuously argued before us that in the instant case it was obligatory on the part of the trial judge to stay the proceedings. For this proposition he has placed reliance on a case **Balu Ganpat Koshire vs. State of Maharashtra 1983 (2) Bom.C.R. 231.** The facts of the said case and the facts of the case in hand are quite different. In that case there was contention that the accused was insane at the relevant time and it was so taken since beginning, while here it is not so. Moreover, in the above case it is no where stated that once such contention is taken by the accused, the trial must be stayed. On the contrary in the said case it is observed that all that is necessary as per the provisions of Section 329 of the Code of Criminal Procedure is that once the plea with regard to insanity is taken by the accused then the Court has to first inquire about the same and come to the definite conclusion as to whether the accused is in fact insane or not and then only the trial court can proceed with the trial. In that case, admittedly, no such inquiry was held, while in the instant case when application

Exhibit 23 was submitted the trial judge rightly sent the accused to the Civil Surgeon for observation. Not only that, thereafter, the concerned doctor has been examined and after taking into consideration all the said material and the conduct of the accused, the trial court reached to the conclusion that there was no necessity to stay the trial. It is pertinent to note that the said order of the trial court was not at all challenged in the higher court. Not only that, incidently, it must also be noted that even in the present appeal memo no such ground is taken by the accused. So, under these circumstances, we do not find that there is any substance in the arguments advanced by the learned Advocate for the accused in this behalf. On the contrary, Mrs. Pai, learned APP has placed reliance on a case **Shivaswamy vs. State of Mysore 1971 Cri.L.J. 1193** wherein the Apex Court has held that under Section 465 of the Criminal Procedure Code, if on examining the accused it does not appear to the Sessions Judge that the accused is insane he need not hold any further inquiry into the matter. In the instant case, the trial judge has taken due care about the said point. It must also be noted here that if really the accused would have been insane at the time of offence then he would not have said to his daughter that she should not cry, otherwise the neighbours would

gather. Not only that, but we find that to cover up his misdeed he gave false explanation. This indicates that at the relevant time he was not insane. Admittedly, there is also no evidence on record to show that after he was treated at Belgaum about five years back, thereafter, he had taken any further treatment for the said alleged mental disorder. So, under such circumstances the accused is not entitled to get benefit of Section 84 of I.P.C. or Section 329 of Cr.P.C.

15. From the evidence on record, we are of the view that the learned trial Judge has properly appreciated the evidence on record and has rightly come to the conclusion that the prosecution has proved beyond reasonable doubt that the accused has committed the offence punishable under Section 302 of the I.P.C.

16. In this view of the matter, there is no substance in the appeal. The Appeal is dismissed.

The order of conviction and sentence passed by the trial Court is confirmed.

(S.R.SATHE, J.) (S.B.MHASE,J.)